IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M. SASIDHARAN NAMBIAR

MONDAY, THE 22ND JANUARY 2007 / 2ND MAGHA 1928

WP(C).No. 31853 of 2006(P)

AGAINST THE ORDER DATED 04.11.2006 IN IA. 2065/2006 IN OS.129/2006 of MUNSIFF COURT, MANJERI

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PETITIONER:

P. SAFIYA,
W/O. LATE C. N. MUHAMMED KOYA,
CHERUNALAKATH VEEDU, CHUNAKATHARA AMSOM DESOM,
NILAMBUR TALUK, MALAPPURAM DISTRICT.

BY ADV. SRI. R. RAJESH KORMATH

RESPONDENT:

V. P. UMMER, S/O. KUNHAMMED HAJI,
VALIYAPARAMBATH VEEDU, CHUNKATHARA AMSOM DESOM,
NILAMBUR TALUK, MALAPPURAM DISTRICT.

BY ADV. SRI. P. SAMSUDIN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 22/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

A P P E N D I X

PETITIONER'S EXHIBITS:

EXT. P1	**:**	**COPY OF THE PLAINT DATED 26.05.2006 IN O.S. NO. 129 OF 2006 ON THE FILE OF THE COURT OF THE MUNSIFF OF MANJERI.**
EXT. P2	**:**	**COPY OF THE AFFIDAVIT DATED 26.05.2006 ACCOMPANYING I.A. NO. 1089 OF 2006 IN O.S. NO. 129 OF 2006 ON THE FILE OF THE COURT OF THE MUNSIFF OF MANJERI.**
EXT. P3	**:**	**COPY OF THE COUNTER STATEMENT DATED 14.07.2006 TO I.A. NO. 1089 OF 2006 IN O.S. NO. 129 OF 2006 ON THE FILE OF THE COURT OF THE MUNSIFF OF MANJERI.**
EXT. P4	**:**	**COPY OF THE WRITTEN STATEMENT DATED 19.08.2006 IN O.S. NO. 129 OF 2006 ON THE FILE OF THE COURT OF THE MUNSIFF OF MANJERI.**
EXT. P5	**:**	**COPY OF THE AFFIDAVIT DATED 10.10.2006 ACCOMPANYING I.A. NO. 2065 OF 2006 IN O.S. NO. 129 OF 2006 ON THE FILE OF THE COURT OF THE MUNSIFF OF MANJERI.**
EXT. P6	**:**	**COPY OF THE COUNTER STATEMENT DATED 31.10.2006 TO I.A. NO. 2065 OF 2006 IN O.S. NO. 129 OF 2006 ON THE FILE OF THE COURT OF THE MUNSIFF OF MANJERI.**
EXT. P7	**:**	**COPY OF THE COUNTER STATEMENT DATED 23.09.2006 TO I.A. NO. 1852 OF 2006 IN O.S. NO. 129 OF 2006 ON THE FILE OF THE COURT OF MUNSIFF OF MANJERI.**
EXT. P8	**:**	**COPY OF THE COMMISSIONER'S REPORT DATED 23.09.2006.**
EXT. P9	**:**	**COPY OF THE COMMISSIONER'S SKETCH DATED 23.09.2006.**
EXT. P10	**:**	**COPY OF THE ORDER DATED 04.11.2006 IN I.A. NO. 2065 OF 2006 IN O.S. NO. 129 OF 2006 ON THE FILE OF THE COURT OF THE MUNSIFF OF MANJERI.**

// TRUE COPY //

P.A. TO JUDGE.

smp

M. SASIDHARAN NAMBIAR, J.

W.P.(C) NO. 31853 OF 2006

Dated this the 22nd day of January, 2007.

J U D G M E N T

Petitioner is defendant and respondent plaintiff in O.S. 129/2006 on the file of Munsiff Court, Manjeri. Respondent filed I.A. 1089/06 under Order XXXIX Rule 1 of Code of Civil Procedure, for an order of temporary injunction till disposal of the suit. An ex parte order of temporary injunction was granted. Petitioner appeared and filed an objection. Petitioner was not heard on merit and the order of injunction was continued. Respondent filed I.A. 1851/06, an application to appoint a commission to inspect the property contending that in violation of the order of injunction, petitioner attempted to construct a compound wall. Commissioner submitted report and sketch. Respondent thereafter filed I.A. 2065/06 for restoration of B schedule pathway to its original state. The said application was filed under Section 151 of the Code of Civil Procedure, though the remedy sought for is as provided under Order XXXIX Rule 4 of Code of Civil Procedure. Petitioner objected to the application. When I.A. 2065/06 was heard, it was contended by petitioner that learned Munsiff has to hear injunction application and only thereafter orders may be passed in I.A. 2065/06. Learned Munsiff did not agree with that course and

allowed I.A. 2065/06. Under Ext. P10 order petitioner was directed to restore the pathway to its original position within three days of passing of the order and held that on failure to do so, the defence will be struck off. Ext. P10 order is challenged in this petition filed under Article 227 of Constitution of India.

2. Learned counsel appearing for petitioner and respondent were heard. It is submitted that as directed the pathway was restored.

3. Though I.A. 2065/06 was filed under Section 151 of Code of Civil Procedure, in effect it could be treated only as an application under Order XXXIX Rule 4 of Code of Civil Procedure. When petitioner resisted the application for temporary injunction and wanted the application to be heard, it was not proper on the part of the learned Munsiff to retain the ex parte order of injunction in I.A. 1089/06 without passing a final order as mandated under Order XXXIX Rule 3A of Code of Civil Procedure. Rule 3A mandates that when an ex parte order of temporary injunction is granted, court has to pass final order within 30 days and if not, reasons have to be recorded. When petitioner filed an objection to the application and contended that, respondent has no prima facie case and therefore order of temporary injunction is to be vaccated, before considering the question whether there is violation of order of temporary injunction granted by the Munsiff, Munsiff should have heard I.A. 1089/06, if not earlier atleast

along with I.A. 2065/06. So also when Rule 4 of Order XXXIX of Code of Civil Procedure provides the mode for dealing with violation of an order of injunction, it was not proper on the part of the court to direct striking off the defence as has been done in Ext. P10 order. Though learned counsel appearing for respondent relying on the decision of this Court in ***Parukutty Amma vs. Thankamma Amma*** **(1988(1) KLT 883)** and ***Mangalam vs. Velayudhan Asari*** **(1992 (2) KLT 553)** argued that it is competent for the court to strike off the defence, if the parties disobey the order passed by the Court, the facts of those cases are entirely different and they are not cases where Rule 4 of Order XXXIX applies or specific remedy is provided for.

In such circumstance, Ext. P10 order is quashed. Learned Munsiff is directed to hear I.A. 1089/06 and decide whether respondent is entitled for the order of temporary injunction. It is represented by learned counsel appearing for petitioner and respondent that, subsequent to the order in I.A. 2065/06, the pathway has been restored to its original position and therefore no order in I.A. 2065/06 is necessary at this stage.

Petition disposed of accordingly.

M. SASIDHARAN NAMBIAR, JUDGE.

smp